Supreme Court, U.S.
FILED
JUN 26 1980
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1979

Misc. No. 79-2043

WIGGINESS, INC., SPARTACUS SPA, INC., LEA FACILITIES, INC., AL SIGELOW, d/b/a GREENWOOD ENTERPRISES, NEW WAVE SOCIAL CLUB, INC., PRIMERO CONSTRUCTION CORP.,

Petitioners,

— against —

IRWIN FRUCHTMAN, INDIVIDUALLY AND AS COMMISSIONER OF THE DEPARTMENT OF BUILDINGS OF THE CITY OF NEW YORK, ALLEN SCHWARTZ, INDIVIDUALLY AND AS CORPORATION COUNSEL OF THE CITY OF NEW YORK, ROBERT MCGUIRE, INDIVIDUALLY AND AS POLICE COMMISSIONER OF THE CITY OF NEW YORK, AND EDWARD TRICOMI,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

page

OPINION BELOW.....2

JURISDICTION.....2

QUESTION PRESENTED.....3

CONSTITUTIONAL PROVISIONS INVOLVED.....3

ORDINANCE WHICH IS THE SUBJECT OF THIS ACTION.....3

STATEMENT OF FACTS.....5

REASONS FOR GRANTING THE WRIT.....8

CONCLUSION.....23

APPENDIX.....1a-55a

APPENDIX A, ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.....1a-2a

APPENDIX B, OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.....3a-51a

APPENDIX C, AMENDED ZONING ORDINANCE OF THE CITY OF NEW YORK.....52a-55a

Cantwell v. Connecticut,
310 U.S. 296 (1940).....15

Coates v. Cincinnati,
402 U.S. 611 (1971).....14,18

Connally v. General Construction Co.
269 U.S. 385.....14

Dombrowksi v. Pfister,
380 U.S. 479 (1965).....22

Evans V. Newton,
382 U.S. 296 (1966).....22

Gibson v. Florida Legislative
Investigation Committee,
372 U.S. 539 (1963).....22

Grayned v. City of Rockford,
408 U.S. 104 (1972).....16

Griswold v. Connecticut,
381 U.S. 479 (1965).....22

Louisana v. NAACP,
366 U.S. 293 (1961).....22

Moose Lodge v. Irbis,
407 U.S. 163 (1972).....22

NAACP v. Alabama, 357
U.S. 449.....22

NAACP v. Button,
371 U.S. 415 (1958).....22

Papachristou v. City of
Jacksonville, 405 U.S.
156 (1972).....15,17,18

People v. Dobbs Ferry
Medical Pavillon, Inc.
33 N.Y. 2d 584, 347
NYS 2d 452 (1973).....15,19

People v. Illardo,
48 N.Y. 2d 408, 423
N.Y.S. 2d 470 (1979).....21

People v. Muñoz, 9 NY 2d
51, 211 NYS 2d 146 (1961).....21

People v. Scott, 26 N.Y.
2d 286, 309 NYS 2d
919 (1970).....20

Smith v. Goguen, 415 U.S.
566 (1974).....14,16,19

Thornhill v. Alabama, 310
U.S. 88 (1940).....17,22

Wigginess Inc. v. Fruchtman,
79 Civ 5675 (RJW).....18

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners respectfully pray a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Second Circuit decided April 28, 1980.

OPINION BELOW

The judgment and order of the United States Court of Appeals for the Second Circuit in this case is not yet reported and is set forth herein in full in the Appendix A. The said judgment affirmed, with one minor reservation hereinafter referred to, a judgment of the United States District Court for the Southern District of New York denying Petitioners' application for preliminary injunction and granting Respondents' cross motion to dismiss with respect to virtually all of Petitioners' claims. The opinion of the District Court, Honorable Robert J. Ward, rendered December 28, 1978 is annexed hereto as Appendix B. The said judgment of the United States Court of Appeals for the Second Circuit directed the lower court to retain jurisdiction over claims of Petitioner Primero Construction Corp., pending a reasonable opportunity for a State Court adjudication, said claim having been dismissed by the District Court.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was decided and filed on April 28, 1980. This Petition for a writ of certiorari was filed within 90 days of that date. Jurisdiction in invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the ordinance in question is not so overbroad and vague in its proscription as to fail to give adequate warning of the acts proscribed thereby and as to vest unlimited discretion in the hands of law enforcement officials to pick and choose the targets of proscription under the ordinance in violation of the due process provisions of the Fourteenth Amendment of the United States Constitution.

2. Whether the ordinance in question is so overbroad in its scope as to chill and inhibit the exercise of First Amendment rights of assembly, association and privacy without the justification of a compelling government interest, in violation of the First and Fourteenth Amendments of the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

The provisions of the United States Constitution involved are the First and Fourteenth Amendments.

ORDINANCE WHICH IS THE SUBJECT OF THIS ACTION

On or about November 23, 1978, the City of New York promulgated an amendment to the New York City Zoning Resolution which purports to outlaw the establishment of an "Adult Physical Culture Establishment" within the City of New York and which requires the "amortization" of any existing "Adult Physical Culture Establishment" within one year of the adoption of the

said ordinance, i.e., in November 1979. A copy of the ordinance is set forth as Appendix C.

The aforesaid amendment defines "Adult Physical Culture Establishment" (hereinafter referred to as APCE) as follows:

> "Adult Physical Culture Establishment is any club or business by whatever name designated which offers or advertises or is equipped or arranged so as to provide as part of its' services, massages, body rubs, alochol rubs, baths or other similar treatment, by members of the opposite sex..."
>
> The following uses shall not be included within the definition of an Adult Physical Culture Establishment:
>
> (1) Establishments which routinely provide such services by a licensed physician, a licensed Chiropractor, a licensed Osteopath, a licensed Practical Nurse or a Registered Professional Nurse;
>
> (2) Electrolysis treatment by a licensed operator of electrolysis equipment;
>
> (3) Continuing instruction in Martial or performing arts or in organized athletic activities;
>
> (4) Hospitals, Nursing Homes, Medical Clinics or Medical offices; and

(5) Barber Shops or Beauty Parlors which offer massages to the scalp, the face, the neck or shoulders only.

A sixth exception has been added since the adoption of the ordinance by excluding licensed masseurs and masseuses from the proscription of the ordinance.

STATEMENT OF FACTS

The underlying facts in the instant case are indisputable. Each of Petitioners was either subjected to the enforcement of the ordinance in question prior to the commencement of this action or has been subjected to its enforcement thereafter. With exception of Petitioner Primero, each is threatened with criminal and civil sanctions for alleged violation of the ordinance. Petitioner Primero has been denied a building permit to construct three apartments in a building which it leases on the grounds that in the opinion of the Building Department of the City of New York, the apartments proposed to be constructed, as set forth in the plan, appeared to be, "equipped or arranged" as an APCE. Petitioner New Wave Social Club, Inc., is a non-profit social club organized under the Not-For-Profit Corporation Law of the State of New York, whose two employees, a receptionist and a locker room attendant, do not come in contact with the club members. Petitioner Lea Facilities, Inc., is a not-for-profit social club organized under the Not-For-Profit Corporation Law of the State of New York, which offers manicures and other such services to its members by employees of the opposite sex.

The other three Petitioners are leisure spas which have male members and female employees who act as manicurists, sun lamp attendants, bath attendants, etc.

Each and all of the Petitioners have denied that they offer body rubs, alcohol rubs, or massages to their patrons or members, and the record below reveals no evidence whatsoever of such conduct. Each Petitioner, however, clearly falls within the ordinance.

It has been customary for officials of the City of New York to summarily close down premises which the said City alleges are occupied in violation of certificates of occupancy or zoning resolutions. The method utilized by officials of the City of New York is to secure ex parte temporary restraining orders followed by preliminary injunctions granted without evidentiary hearings notwithstanding the existance of opposing sworn affidavits expressly contradicting and denying the allegations of the moving papers. By the time the case comes on for a hearing such premises and establishments are no longer in occupancy, tenants being unable to meet such expenses as rent while being closed. The foregoing scenario is called for by the New York City Nuisance Abatement Law, which is not subject to attack in the instant proceeding but which clearly justifies the fear of Petitioners that they will meet the same fate as dozens of tenants subjected to the foregoing charade over the past few years.

Petitioners are also faced with criminal sanctions of up to one year in jail and $5000 fine for violation of the zoning

resolution of the City of New York.

By reason of the foregoing, Petitioners brought this proceeding prior to the effective date of the one year amortization called for by the ordinance. There was never any question below that not only the two establishments that were served under the ordinance prior to the commencement of the action, but the other four as well, some of which have since been served, were regarded as Adult Physical Culture Establishments by the City of New York and would be subject to enforcement under the ordinance.

With respect to Petitioner Primero, it has been unable to obtain approved plans and a permit to construct three apartments for well over a year. It is suffering daily with the three vacant floors in the building.

This action for declaratory judgment and injunctive relief against the ordinance came on for hearing on a motion for preliminary injunction in the United States District Court for the Southern District of New York before the Honorable Robert J. Ward who, without taking testimony, denied Petitioners motion for preliminary injunction and granted Respondents motion to dismiss with respect to all of Petitioners' claims except the due process attack upon the one year amortization, which it agreed to hear as to all Petitioners except Primero.

The Court of Appeals for the Second Circuit corrected the Pullman Absention dismissal by the Court below by ordering that Court to retain jurisdiction over the claim of Primero pending State Court con-

struction of the ordinance. With that exception, it affirmed the decision below in all respects.

REASONS FOR GRANTING THE WRIT

The District Court treated the ordinance as if it were a cross sexual massage ordinance, erroneously stated that all Petitioners with the exception of Primero had admitted that they offered massage services on the premises, and concluded that those five Petitioners could not complain of the vagueness or overbreadth of the ordinance. The District Court abstained as to Primero on Pullman grounds. In view of the foregoing determinations of the District Court, it did not find it necessary to analyze either the vagueness and overbreadth arguments relating to First Amendment rights of privacy and association. The District Court, having treated the instant ordinance as if it were a cross sexual massage ordinance, rested its determination on a series of decisions of this Court which have held that various equal protection and due process attacks on cross sexual massage laws did not set forth substantial federal questions.

As has been noted heretofore, the Court of Appeals for the Second Circuit did not see fit to write an opinion.

It is respectfully submitted to this Court that the ordinance in question is not a cross sexual massage ordinance of the kind this Court has ever considered, is not even a cross sexual touching ordinance, but is merely a blank check which

authorizes law enforcement officials of the City of New York by any person as to whom the speculation of indecent or unlawful motivation is attributed. The enforcement of the ordinance with respect to Primero is the clearest example of the scope thereof. Enforcement of the ordinance with respect to a private social club which has absolutely no touching between members and employees is a further indication of the scope of the ordinance.

The definition of "Adult Physical Culture Establishment" is:

> "Any establishment, club or business by whatever name designated which offers or advertises or is equipped or arranged so as to provide as part of its services, massages, body rubs, alcohol rubs, baths or other similar treatment by members of the opposite sex."

Lest there by any doubt as to the all encompassing scope of the definition, the ordinance goes on to itemize various exclusions from the foregoing definiton, which exclusions clearly signify the scope of the definition. These exclusions are as follows:

(1) Establishments which roucinely provide such services by a licensed physician, a licensed Chiropractor, a licensed Osteopath, a licensed Practical Nurse or a Registered Professional Nurse;

(2) Electrolysis treatment by a licensed operator of electrolysis equipment;

(3) Continuing instruction in Martial or performing arts or in organized athletic activities;

(4) Hospitals, Nursing Homes, Medical Clinics or Medical Offices;

(5) Barber shops or Beauty Parlors which offer massage to the scalp, the face, the neck or shoulders only; and

(6) Licensed masseurs and masseuses.

The exclusion of electrolysis treatment makes it abuntantly clear that any touching by members of the opposite sex, even with the intervention of an instrument, brings the act within the meaning of the ordinance. The ordinance itself outlaws premises which could be used for cross sexual baths whether for a fee or not since the word business is set forth in the disjunctive with respect to "club" or "establishment". Further, the words of the ordinance as well as its enforcement with respect to Petitioner, Primero Construction Corp., establishes that the premises need not be used in the manner proscribed by the statute but need only be "equipped or "arranged" in such a manner as to permit its use in the proscribed manner. The words "other similar treatment" make the scope of the ordinance all encompassing.

Five Petitioners admit that their premises are equipped or arranged so as to be usable for cross sexual baths and the sixth seeks a building permit for construction which would make it usable for such purpose, a purpose explicitly proscribed by the ordinance in the clearest most unequivocal terms.

Clearly, a Manicurist, Pedicurist, Bath Attendant, Dental Technician, Dentist, Registered Professional Nurse who is not then in an establishment which routinely provides such services, a person engaged in practice of any performing art or organized athletic activity as opposed to a person involved in continuing instruction in such activity, etc. are covered by the ordinance in whatever premises they may be "by whatever name designated", including but not limited to their own homes.

There is no premises in the City of New York which is not "equipped or "arranged" for the rendition of the proscribed acts. With respect to any such premises, the Respondents can outlaw its use based upon their notion of its intended use.

Perhaps the greatest evil of the ordinance is its vesting in the hands of administrative officials such as Respondents herein the standardless and unlimited right to determine which premises they will close and which premises they will allow to remain open, which people they will permit cross sexual touching and which people will be forbidden such touching. The breadth of the ordinance is so great as to set virtually no standards for the exercise of such discretion. The two attempts at enforcement of the ordinance clearly illustrate the foregoing.

The ordinance does not deal with proscriptions of either illegal or immoral conduct. The ordinance covers virtually any premises in which there could be conducted any activity or occupation which involves the touching by one person of another whether through the use of an intervening instrument or otherwise. The exemption of electrolysis

makes this abundantly clear. The mind boggles at the overbreadth of the ordinance. We are dealing here with proscription upon the common and customary activities, practices and occupations of society which cannot be impeded or proscribed without a compelling governmental interest. Surely it cannot be the position of the defendants that the only way prostitution can be deterred in the City of New York is by prohibiting premises to exist in which people of the opposite sex could touch each other. This, however, must be their position if they are to claim that the ordinance has any rational nexus at all.

While the City of New York has been known to attempt to burn down the house to roast the pig, this ordinance reaches the epitome of the practice.

Would a woman be permitted to tatoo a man under this ordinance? Would a Registered Nurse be permitted to give a patient a massage in the patient's home under this ordinance? Would a dance hostess be permitted to dance with a customer under this ordinance? Would a woman be permitted to give a man a manicure under this ordinance? Would any of Petitioners' female bath attendants be permitted to towel dry a patron in any of Petitioners' premises? Would a wife or girlfriend be permitted to give her husband or boyfriend an alcohol rub in any of Primero Construction Corp's three apartments if it were permitted to construct such apartments? The examples are myriad; the overbreadth and vagueness of the ordinance astounding.

It cannot be overemphasized that the evil of the ordinance herein is not traditional concept of vagueness, i.e., that its

proscription cannot be understood, it is in its overbreadth, i.e., in that it is so all encompassing that it covers any premises which is not "equipped or arranged so as to provide as part of its services massages, body rubs, alcohol rubs, baths or other similar treatment by members of the opposite sex". Each of the Petitioners herein has a premises in which there are baths and which is equipped or arranged for the use of such baths by members of any sex including members of the opposite sex. It cannot be the subject of dispute that each of the Petitioners fall squarely within the proscription of this ambiguous but overbroad ordinance. This is so notwithstanding the fact that there is no evidence whatsoever on the record that any of the premises offer cross sexual massages.

By virtue of the foregoing, nothing could be clearer than the fact that the ordinance in question is not a cross sexual massage ordinance but is rather an ordinance which allows administrative and other law enforcement officials of the City of New York to prohibit and punish by means of civil and criminal sanctions any person whom they feel fit to so sanction merely because that person is connected with a premises within the City of New York which is deemed undesirable by such administrative or law enforcement agents.

It is apparent from the papers of Respondents below that the evil sought to be extinquished through the use of this overbroad ordinance is prostitution under the guise of massage. The zoning resolution, however, neither directs itself against prostitution nor limits its proscription to massage. No comparable ordinance has ever been adopted anywhere, and no case has been or

could be cited to uphold such a zoning resolution.

Confronted with the ordinance, the man of ordinary intelligence cannot possibly receive fair notice of what is prohibited. Although the ordinance clearly states that every premises in New York City which is equipped so as to offer a bath or alcohol rub is unlawful, it is apparent to anyone of normal intelligence that the ordinnace cannot mean what it states, because such a broad prohibition would make every person in the City of New York subject to criminal prosecution.

An overbroad law, like the APCE ordinance, is void because it "simply has no core" in that it lacks "any ascertainable standard for inclusion and exclusion" of what is covered by the statute, Smith v. Goguen, 415 U.S. 566, 578 (1974). The APCE ordinance is void

> "not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible standard, but rather in the sense that no standard of conduct is specified at all. As a result, men of common intelligence must necessarily guess at its meaning.' Connally v. General Construction Co., 269 U.S. 385." Coates v. Cincinnati, 402 U.S. 611, 614 (1971)

There is nothing imprecise or indefinite about the ordinance's language which a state Court can refine into a comprehensible standard. On the contrary, the language of the ordinance ("equipped or arranged so as to provide...alcohol rubs, baths...") is clear

and specific in its indication that the ordinance applies to every establishment in New York City in a standardless and overbroad manner.

That the APCE ordinance may deter some criminal behavoir does not excuse its overbreadth. A law which sweeps in a great variety of conduct under a general and indefinite characterization cannot be sustained under the due process clause. Cantwell v. Connecticut, 310 U.S. 296 (1940), People v. Dobbs Ferry Medical Pavillon, Inc., 33 N.Y. 2d 584, 347 N.Y.S. 2d 452 (1973). A statute may not be worded overbroadly so that courts may pick and choose those whom they will prosecute or so that police may have a large arsenal for enforcing the law. Legislatures cannot set nets large enough to catch all possible offenders and leave to law enforcers the task of selecting targets for enforcements. A law is only valid if it is fenced in with narrow and definite language that gives notice of the kind of conduct to be avoided. Papachristou v. City of Jacksonville, 405 U.S. 156 (1972).

The net cast by the APCE ordinance is unlimited, thus allowing police and judges unlimited discretion to crush all kinds of behavior. By casting such a large net, however, the APCE ordinance provides, without warning, a trap for the innocent who are engaged in the exercise of their constitutional rights. For this reason, the APCE ordinance is void.

The APCE ordinance also offends the second requirement of the vagueness doctrine, that law enforcement officials and triers of fact be given clear guidelines for enforcing the law.

The second requirement has been called the most meaningful aspect of the doctrine, Smith v. Goguen, 415 U.S. 574. Under the second requirement, legislatures are required to establish minimal standards for law enforcement. When legislatures abdicate this basic responsibility and enact statutes of a standardless sweep, selective law enforcement results. Policemen, prosecutors and juries are allowed to pursue their personal predilections. Law making is entrusted to the moment to moment judgment of the policeman on his beat. Smith v. Goguen, 415 U.S. 574, 76. The "unfettered latitude thereby accorded law enforcement officials and triers of fact" is violative of due process. Smith v. Gougen, 415 U.S. 574, 578.

How can police enforce and juries apply a law which declares every premises in New York City unlawful? The obvious answer is that they cannot, unless they pick and choose those whom they will prosecute. Clearly, the APCE Ordinance "impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." Grayned v. City of Rockford, 408 U.S. 104, 109 (1972)

The danger presented by the APCE ordinance's unfettered grant of power of law enforcement officials is frightening. Lacking the guidance of a clear and narrow legislative mandate, police and triers of fact are free to vent their anger and prejudices on whomever they fancy. The following language could well describe the APCE ordinance:

> "[T]here are no standards governing the exercise of the discretion granted by the ordinance, the scheme permits and encourages an arbitrary and discriminatory enforcement of the law. It furnishes a convenient tool for 'harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure,' Thornhill v. Alabama, 310 U.S. 88, 97-98." Papachristou v. City of Jacksonville, 405 U.S. 170

The classic example of law enforcement officials utilizing the APCE ordinance as a harsh tool against a group meriting their displeasure occurs in the case of Petitioner Primero Construction Corporation. In the District Court opinion below, Judge Ward described Primero's position as follows:

> "Primero Construction Corporation ('Primero') is a New York corporation which holds a lease on premises at West Forty-Fourth Street in Manhattan. The City Buildings Department has refused to issue Primero a building permit to construct what Primero claims will be residential apartments on the third, fourth and fifth floors of the premises. The Buildings Department claims...that one reason [why the permit was denied] is the expectation on city officials part that the premises would not be used for residential apartments but for an APCE. Apparently the first two floors of the building currently house a swingers club known as Xtazy, which

> the city believes is run by Fred Fredericks, the president of Primero." Wigginess, Inc. v. Fruchtman, 79 Civ 5675 (RJW), p. 2-3

In a footnote, Judge Ward adds that "the city has not said whether it believes Xtazy to be an APCE."

In sum, because the city suspects that Fred Fredericks is currently operating an APCE and therefore might open another APCE, his company, Primero, has been denied a permit for residential apartments. Judge Ward's words show beyond a doubt that the APCE ordinance can be used, as a harsh tool outlawing private residences, against individuals, like Fred Fredericks, who have been deemed to merit the arbitrary disapproval of local prosecuting officials.

In Papachristou v. City of Jacksonville, 405 U.S. 156 (1972), the Court voided a municipal ordinance which, among other things, prohibited "persons wandering or strolling around from place to place without any lawful purpose or object", on the grounds that the ordinance's breadth made criminal activities which by modern standards are normally innocent.

Similarly, in Coates v. Cincinnati, 402 U.S. 611 (1971), the Court voided an ordinance making it a criminal offense for three or more people to assemble on a sidewalk and there conduct themselves in a manner annoying to persons passing by; the Court said the ordinance was unconstitutionally broad, because it authorized the punishment of constitutionally protected activity.

In Smith v. Goguen, 415 U.S. 566 (1972), the Court voided a statute imposing criminal liability on one who publicly "treats contemputously" the United States flag. The Court said that the language under which the defendant was charged failed to draw reasonably clear lines between the kinds of nonceremonial treatment that were criminal and those that were not. In other words, the statute was overbroad in its inclusion of innocent conduct.

The three laws discussed above, prohibiting wandering about from place to place, assembling on a public sidewalk in groups, and debasing the flag in a nonceremonial manner, are far less broad than the APCE ordinance's prohibition of all homes and businesses in New York City.

The New York Court of Appeals has often voided statutes which were far narrower than the APCE ordinance.

In People v. Dobbs Ferry Medical Pavillon, 33 NY 2d 584, 347 N.Y.S. 452 (1973), the Court of Appeals ruled that a law outlawing the existence of an unlicensed abortion clinic was void for overbreadth: "The applicable statute and regulations governing the requirement of a license for an enterprise engaged in institutional medical care and treatment are entirely too broad," 33 NY 2d 584, 347 N.Y.S. 2d 452.

The broadness problem centered on the use of the words "facility" and "clinic":

> "The terms 'facility' and 'clinic', most often used, are inclusive of many kinds of individual, partnership, and group medical practice, which concededly are not subject

> to or intended to be subject to licensing." 33 NY 2d 584,347 N.Y.S. 2d 452.

In People v. Scott, 26 N.Y. 2d 286, 309 NYS 2d 919 (1970), the New York Court of Appeals held that a town ordinance prohibiting the open storage of one or more inoperable vehicles was unconstitutional. The Court objected to the ordinance on the ground that it was so broad that it would prohibit a land-owner from maintaining a single antique for his own reasons:

> "...the town here would punish the owner who stores one vehicle. Such a Draconian penalty seems unreasonable and, in addition, to a degree so vast as to cast doubt on its validity....Indeed, the prohibition, against inoperable vehicles is too broad. The modifying language,' for legal use on the public highways', is so comprehensive as to include in its prohibitions the storage of a 1970 automobile in perfect functional condition but which may not be used on the public highways because it does not have a validated inspection sticker." 26 NY 2d 292, 309 NYS 2d 923

In discussing the manner in which the town ordinance violated due process, the Court of Appeals stressed that because failure to comply with the ordinance could involve penal sanctions, the ordinance had to meet the rigorous tests which have been established for criminal enactments. Where criminal penalties are involved, a law must not only be strictly construed but must be also be reasonable and pellucid.

In People v. Munoz, 9 NY 2d 51, 211 NYS 2d 146 (1961), the Court of Appeals invalidated a section of the New York City Administrative Code, making it unlawful for persons under twenty-one years of age to have possession of knives and sharp pointed or edged instruments because there was "no boundary excluding from the section's coverage the most commonly used and innocently possessed devices of everyday life." 9 NY 2d 57, 211 NYS 2d 150. The Court found the code section so broad that possession of "penknives, knitting needles, fountain pens and the like" was made into a criminal offense.

The APCE ordinance is similarly broad in that it outlaws all "commonly used and innocently possessed" establishments in New York City.

Although the following has been stated many times in many ways by the highest Courts of New York State and the United States, it cannot be overemphasized that

> "As common sense and experience both tell us, unless by its terms a law is clear and positive, it leaves virtually unfettered discretion in the hands of law enforcement officials and thereby may encourage arbitrary and discriminatory administration." People v. Illardo, 48 N.Y. 2d 408, 423 N.Y.S. 2d 470 at 472 (1979)

The enforcement of the instant ordinance against Primero is the classic example of the evils of the instant ordinance.

How much more so do the foregoing principles affect the First Amendment activities

of Petitioners Lea Facilities, Inc., and New Wave Social Club, Inc., two non profit social clubs.

It not longer can be doubted that the First Amendment protects rights of association as surely as it protects rights of speech and religion. NAACP v. Alabama, 357 U.S. 449; Louisana v. NAACP, 366 U.S. 293 (1961), Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539 (1963). This freedom of association includes social clubs and social intercourse just as much as it does political association. Griswold v. Connecticut, 381 U.S. 479 (1965); Evans v. Newton, 382 U.S. 296 (1966); Moose Lodge v. Irbis, 407 U.S. 163 (1972).

First Amendment principles differ markedly from other constitutional principals in numerous respects. One such respect is the right to assert first amendment rights of others in an attack upon an overbroad statute which inhibits or could inhibit the exercise of First Amendment rights. Dombrowski v. Pfister, 380 U.S. 479 (1965); Thornhill v. Alabama, 310 U.S. 88, 97-98; NAACP v. Button, 371 U.S. 415, 423-3. In the words of Dombrowski, at 486:

> "For example, we have consistently allowed attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificty."

This doctrine of overbreadth applies to First Amendment activity, be it the right to disseminate expression, the right to practice one's religion, or the right to associate with people of one's choice.

Thus, as to the two social clubs involved in the instant case, even if they had conceded that their members engage in cross-sexual massage (which they have not), they would have the requisite standing to attack the overbreadth of this ordinance.

CONCLUSION

Petitioners respectfully submit that the instant ordinance is violative of fundamental concepts of due process and chills the exercise of First Amendment rights of association to an extent that were such legislative draftsmanship to be upheld it would convert this land from a land of laws to a land of men in direct contravention of our must fundamental legal principle.

DATED: New York, New York, June 12, 1980.

Respectfully submitted,

HERBERT S. KASSNER
Attorney for Petitioners

APPENDIX A

United States Court of Appeals

FOR THE

SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit held at the United States Courthouse in the City of New York, on the twenty-eighth day of April nineteen hundred and eighty.

HONORABLE IRVING R. KAUFMAN,
Chief Judge.

HONORABLE JAMES L. OAKES,
Circuit Judge.

HONORABLE CHALRES H. TENNEY,
District Circuit Judge, sitting by designation.

WIGGINESS, INC., SPARATCUS SPA, INC., LEA FACILITIES, INC., AL SIGELOW, d/b/a GREENWOOD ENTERPRISES, NEW WAVE SOCIAL CLUB, PRIMERO CONSTRUCTION CORP.,

Plaintiffs-Appellants,

v.

IRWIN FRUCHTMAN, INDIVIDUALLY AND AS COMMISSIONER OF THE DEPARTMENT OF BUILDINGS OF THE CITY OF NEW YORK, ALLEN SCHWARTZ, INDIVIDUALLY AND AS CORPORATION COUNSEL OF THE CITY OF NEW YORK, ROBERT MCGUIRE, INDIVIDUALLY AND AS POLICE COMMISSIONER OF THE CITY OF NEW YORK, AND EDWARD TRICOMI,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the District Court is directed to retain jurisdiction over the claims raised by appellant Primero Construction Corp. pending a reasonable opportunity for a state court adjudication. See Railroad Commission v. Pullman Co., 312 U.S. 496 (1941); Bellotti v. Baird, 428 U.S. 132, 146-47 (1976). The judgment is otherwise affirmed.

IRWIN R. KAUFMAN, Chief Judge.

JAMES L. OAKES, Circuit Judge.

CHARLES H. TENNEY, District Judge.

APPENDEX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WIGGINESS, INC., SPARTACUS SPA, INC., LEA FACILITIES INC., AL SIGELOW d/b/a GREENWOOD ENTERPRISES, NEW WAVE SOCIAL CLUB, INC., and PRIMERO CONSTRUCTION CORP., Plaintiffs.	:	OPINION
-against-	:	79 Civ.5675(RJW)
IRWIN FRUCHTMAN, individually and as COMMISSIONER OF THE DEPARTMENT OF BUILDINGS OF THE CITY OF NEW YORK, ALLEN SCHWARTZ, individually and as CORPORATION COUNSEL OF THE CITY OF NEW YORK, ROBERT MCGUIRE, individually and as POLICE COMMISSIONER OF THE CITY OF NEW YORK, and EDWARD TRICOMI, Defendants.	:	

A P P E A R A N C E

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WARD, J.

In this action, plaintiffs seek to enjoin certain officials of the City of New York from enforcing the city's zoning ordinance regulating adult physical culture establishments. They also ask this Court to declare the ordinance invalid as violating the United States Constitution, title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Sections 2000a et. seq., and the Human Rights Law of the State of New York, N.Y. Exec. Law Sections 290-301. Jurisdiction is based on 28 U.S.C. Section 1331 and 1343(3) and the doctrine of pendent jurisdiction.[1]

Plaintiffs now move pursuant to Rule 65 Fed. R. Civ. P., for a preliminary injunction enjoining enforcement of the adult physical culture establishment ("APCE") ordinance pending the outcome of this litigation. Defendants, opposing plaintiffs' motion, cross-move under Rule 12

(b)(6), Fed. R. Civ. P., to dismiss plaintiffs' action for failure to state a claim upon which relief can be granted. For the reasons hereinafter stated, plaintiffs' motion is denied and defendants' cross-motion is granted in part and denied in part.

Wigginess Inc., ("Wigginess"), and Spartacus Spa, Inc. ("Spartacus"), two New York corporations, operate "leisure spas" on East Thirty-sixth and East Fifty-fifth Streets, respectively, in New York City's Borough of Manhattan. These two spas are staffed by "hostesses" and "attendants," nearly all of whom are female, and cater solely to a male clientele. The Wigginess and Spartacus spas offer sauna and bath facilities.

Lea Facilities, Inc. ("Lea"), a not-for-profit corporation organized under New York law, operates a "health club" on East Twenty-second Street in Manhattan.

Catering primarily to males, Lea employs women exclusively as the hostesses and bath attendants in its health club. The only male employees at the Lea club are management personnel. This plaintiff's club has a gym, a swimming pool, sauna facilities, locker rooms and showers. Al Sigelow, the president of Lea, also operates a "leisure spa" on Manhattan's West Forty-sixth Street. This spa is equipped with showers and baths and, like Lea, employs only women as hostesses and bath attendants.

New Wave Social Club, Inc. ("New Wave"), like Lea a not-for-profit corporation organized under New York law, is a "swingers club" located on West Fifty-fifth Street in Manhattan. New Wave claims to have only two employees, a receptionist and a locker room attendant, and describes itself as a private club where "members

exercise a minimum of sexual self-restraint in pursuit of a common desire to enjoy themselves and each others [sic] company without repressions or inhibitions."[2]

Primero Construction Corporation ("Primero") is a New York corporation which holds a lease on premises at West Forty-fourth Street in Manhattan. The City Buildings Department has refused to issue Primero a building permit to construct what Primero claims will be residential apartments on the third, fourth and fifth floors of the premises. The Buildings Department claims that there are a number of reasons why this permit was denied but admits that one reason is the expectation on city officials' part that the premises would not be used for residential apartments but for an APCE. Apparently the first two floors of the building currently house a swingers club

known as Xtazy, which the City believes is run by Fred Fredericks, the president of Primero.[3]

New Wave has been issued two orders by the Buildings Department alleging violations of the APCE ordinance. The other five plaintiffs, with the above-noted exception of Primero, have as yet received no notification from city officials that the city considers them in violation of the ordinance.

The named defendants are the New York City officials charged with enforcing the APCE zoning ordinance. Defendant Edward Tricomi is a City Buildings Inspector assigned to the Buildings Department's Midtown Manhattan Enforcement Unit.

On November 16, 1978, the New York City Board of Estimate enacted into law the City Planning Commission's proposal to amend the City's Zoning Resolution to

prohibit future APCEs in the entire City of New York and to require the amortization of all existing APCEs within one year. Section 12-10 of the amended Zoning Resolution defines APCE as follows:

> An "adult physical culture establishment, club or business by whatever name designated which offers or advertises or is equipped or arranged so as to provide as part of its services massages, body rubs, alcohol rubs, baths or other similar treatment by members of the opposite sex. The following uses shall not be included within the definition of an adult physical culture establishment:
>
> (1) establishments which routinely provide such services by a licensed physician, a licensed chiropractor, a licensed osteopath, a licensed practical nurse or a registered professional nurse;
>
> (2) electrolysis treatment by a licensed operator of electrolysis equipment;
>
> (3) continuing instruction in martial or performing arts or in organized athletic activities;

(4) hospitals, nursing homes, medical clinics or medical offices; and

(5) barbershops or beauty parlors which offer massage to the scalp, the face, the neck or shoulders only.

Section 52-76 of the Resolution requires that:

> In all districts [i.e., the entire city] any adult physical culture establishment, unless subject to an earlier termination requirement contained in this Resolution, shall terminate not later than one year after the effective date of this provision and thereafter the space formerly occupied by such use shall be used only for a conforming use.

Plaintiffs claim the APCE definition is vague and overbroad. They contend that in prohibiting APCEs the zoning ordinance effectively "proscribes crossexual [sic] touching in the entire City of New York" and thus violates constitutionally protected rights of privacy and association. Plaintiffs also argue that the ordinance violates the due process clause by

interfering with the allegedly fundamental right of plaintiffs and their employees to work in the common occupations of the community. Maintaining that the requirement that no establishment offer massages or similar treatment to members of the opposite sex would force them to hire and discharge employees on the basis of sex, plaintiffs Wigginess, Spartacus, Lea and Sigelow claim the ordinance violates the equal protection clause and stands in contravention of federal statutory provisions prohibiting sex-based employment discrimination. The Court finds that each of the above contentions is without merit.

In addition, plaintiffs argue that the one-year amortization period prescribed by the ordinance for termination of all nonconforming APCE uses is so unreasonably short that it constitutes a taking of private property without just compensation

in violation of the Fifth Amendment. Although the Court entertains serious doubt that plaintiffs will be able to succeed on the merits of this argument, the question whether it is reasonable to allow a maximum of only one year to APCEs to continue their nonconforming uses involves issues of fact and should not be decided on a motion to dismiss. Provided plaintiffs Wigginess, Spartacus, Lea, Sigelow and New Wave establish the standing to challenge the amortization period,[4] the Court will determine after appropriate fact-finding proceedings whether the amortization period can be constitutionally applied.[5]

I

Article III of the Constitution limits the jurisdiction of federal courts to cases or controversies.

> Federal courts have no power per se to declare statutes unconstitutional. . . . The constitutional requirement of a justiciable controversy is met only where [a] plaintiff has sustained, or is in immediate danger of sustaining, some direct injury, as a result of which there arises an honest and active antagonistic assertion of rights. . . . There must be a genuine threat of enforcement of a disputed state ... statute before a case or controversy involving that statute may be said to exist.

St. Martin's Press, Inc. v. Carey, 605 F. 2d 41, 44 (2d Cir. 1979) (citations omitted). Only plaintiffs New Wave and Primero have alleged that the City has taken some enforcement action against them. New Wave has been issued two violation orders, and Primero has been denied a building permit because, inter alia, the city suspects Primero's proposed building renovation is for the purpose of establishing an APCE. The other plaintiffs' only "injury in fact," Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150,

152 (1970), is the fear that they will be closed after summary proceedings in the courts of New York State. They have been issued no notice of violations and have received no threats of prosecution from city officials.

Defendants have moved to dismiss plaintiffs' complaint for failure to state a claim upon which relief can be granted. In reviewing the sufficiency of a complaint in the context of such a motion, the Court must "treat all of the well-pleaded allegations of the complaint as true," Miree v. DeKalb County, 433 U.S. 25, 27 n.2 (1977), and give plaintiffs the benefit of any facts that could possibly be proved to support their claims. George C. Frey Ready Mixed Concrete, Inc. v. Pine Hill Concrete Mix Corp., 554 F.2d 551, 553 (2d Cir. 1977). Viewing the face of the complaint and resolving all doubts in plaintiffs' favor, the Court finds that the establishments

run by plaintiffs Wigginess, Spartacus, Lea and Sigelow fall within the definition of APCE and are thus subject to prosecution for zoning violations under the ordinance. The City gives no indication that it does not intend to enforce the APCE prohibition vigorously. It is at least arguable, therefore, that each of the plaintiffs here has alleged "such a personal stake in the outcome" of this action to warrant the invocation of federal court jurisdiction. Warth v. Seldin, 422 U.S. 490, 498 (1975).[6]

II

The Court need not determine at this juncture whether plaintiffs have conclusively established standing to challenge the APCE zoning ordinance. Even assuming plaintiffs have standing to litigate this challenge, all of plaintiffs' claims, with the exception of the conten-

tion that the APCE amortization period violates the taking clause of the Fifth Amendment, must be dismissed on the merits. Moreover, as none of the claims raised by Primero can withstand defendants' motion to dismiss, Primero's action is dismissed in its entirety.

A

Primero does not now operate an APCE and thus is not affected by the one-year amortization requirement for nonconforming uses. The City Building Department's denial of Primero's permit is subject to administrative review and, if necessary, judicial scrutiny under Article 78 of the N.Y. CPLR. This Court can only assume the administrative agencies of the City of New York and the courts of New York State will apply the zoning ordinance in accordance with the United States Constitution. The ordinance is not unconsti-

tutional on its face and, this Court believes, can be construed by the state courts to eliminate any constitutional issue. District Court "abstention is appropriate where an unconstrued state statute is susceptible of a construction by the state judiciary 'which might avoid in whole or in part the necessity for federal constitutional adjudication, or at least materially change the nature of the problem.'" Bellotti v. Baird, 428 U.S. 132, 146-147 (1976). See also St. Martin's Press, Inc. v. Carey, supra, 605 F.2d at 44 n. 2. It is not this Court's role to review zoning decisions made by local administrative officials.

B

This litigation is not the first instance in which constitutional claims have been made against ordinances and

statutes prohibiting massages and similar treatment administered to persons of the opposite sex. Statutory proscriptions outlawing opposite-sex massages have been enacted by both state and local governments and, with no significant exception, have all withstood constitutional attack. On four recent occasions lower court rulings upholding such laws have been appealed to the Supreme Court and on each of these occasions the Court has dismissed the appeals because the cases failed to raise a substantial federal question. City of Indianapolis v. Wright, 371 N.E. 2d 1298 (Ind.), appeal dismissed for want of substantial federal question, 439 U.S. 804 (1978); Smith v. Keator, 285 N.C. 530, 206 S.E.2d 203, appeal dismissed for want of substantial federal question, 419 U.S. 1043 (1974); Rubenstein v. Township of Cherry Hill (N.J. Sup. Ct., unreported,

Jan. 29, 1974); appeal dismissed for want of substantial federal question, 417 U.S. 963 (1974); Kisley v. City of Falls Church, 262 Va. 693, 187 S.E.2d 168, appeal dismissed for want of substantial federal question, 409 U.S. 907 (1972).

The Supreme Court in Hicks v. Miranda, 422 U.S. 332, 344 (1975), explained that its dismissal of an appeal for want of a substantial federal question is an adjudication on the merits. It is for the lower courts to ascertain "the reach and content of [these] summary actions," id. at 345 n.14, keeping in mind that summary affirmances and dismissals by the Supreme Court "must in each case be analyzed carefully in order to discover what issues were actually before the Court." Mercado v. Rockefeller, 502 F. 2d 666, 673 (2d Cir. 1974), cert. denied, 420 U.S. 925 (1975). Although such sum-

mary actions "reject the specific challenges presented in the statement of jurisdiction and. . . . prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided" below, they do not adopt the reasoning of the decision from which appeal to the Supreme Court is taken. Mandel v. Bradley, 432 U.S. 173, 176 (1977) (per curiam).

City of Indianapolis v. Wright, supra, is the most recent case challenging the constitutionality of an ordinance prohibiting opposite-sex massages to be dismissed by the Supreme Court for want of a substantial federal question. The Indiana Supreme Court in Wright had rejected the contention that an Indianapolis ordinance prohibiting, inter alia, the administering of any massage to a person of the opposite sex violated the due process

and equal protection clauses of the Fourteenth Amendment. The Wright court considered the earlier Supreme Court dismissals in Smith v. Keator, supra, Rubenstein v. Township of Cherry Hill, supra, and Kisley v. City of Falls Church, supra, dispositive of all Wright plaintiffs' claims that the similar Indianapolis ordinance prohibiting opposite-sex massages was unconstitutional.[7]

The North Carolina court in Smith v. Keator saw no unconstitutional sex discrimination in Fayetteville's ordinance making it unlawful for any massagist to treat a person of the opposite sex. When asked on appeal to review that determination, the Supreme Court agreed, implicitly ruling in its dismissal for want of a substantial federal question that the ordinance did not unconstitutionally discriminate on the basis of sex in violation

of the equal protection clause.[8]

The appeals from the New Jersey decision in Rubenstein v. Township of Cherry Hill, supra, and from the Virginia ruling in Kisley v. City of Falls Church, supra, had also presented the Court with equal-protection questions regarding the constitutionality of proscriptions against opposite-sex massages. As noted above, the Supreme Court saw no substantial federal question raised by either the Rubenstein or the Kisley appeal. The appeal in Rubenstein raised the statutory question whether the Cherry Hill ordinance was "repugnant" to the Civil Rights Act of 1964,[9] and the Kisley appeal putting massage establishments out of business, constituted an unconstitutional deprivation of property without due process of law.[10]

Other courts have followed these

summary decisions and rejected constitutional challenges to similar ordinances prohibiting opposite-sex massages. See Tomlinson v. Mayor of Savannah, 543 F.2d (5th Cir. 1976); Hogge v. Johnson, 526 F. 2d 833 (4th Cir. 1975), cert. denied, 428 U.S. 913 (1976); Colorado Springs Amusements, Ltd. v. Rizzo, 524 F.2d 571 (3d Cir. 1975), cert. denied, 428 U.S. 913 (1976); Stratton v. Drumm, 445 F. Supp. 1305 (D. Conn. 1978). Cf. Pollard v. Cockrell, 578 F.2d 1002, 1010-1011 (5th Cir. 1978) (city ordinance regulated but did not prohibit opposite-sex massages). For example, the Fifth Circuit in Tomlinson found that the Supreme Court's summary ruling foreclosed any challenge to a Savannah ordinance prohibiting opposite-sex massages. The plaintiffs in Tomlinson had challenged the Savannah ordinance

> as an abuse of the police power, as an arbitrary restriction of a supposedly due process-protected right to operate a legitimate business, and as a violation of equal protection in that it (1) "irrationally" distinguishes between heterosexual massages and rub-downs where the customer and massagist are the same sex, and (2) unnecessarily burdens their constitutionally "fundamental" right to engage in a legitimate business.

543 F.2d at 571. The Tomlinson plaintiffs also argued that they had

> standing to assert their employees' and customers' alleged rights of privacy impaired by the ordinance, and their employees' potential equal protection claim that the ordinance establishes a gender-dependent classification that cannot withstand the intensive, albeit not "strict," scrutiny to which sex-specific statutes are subjected.

Id. Passing on a similar ordinance, the Fourth Circuit in Hogge v. Johnson found that the Court's dismissal in Kisley v. City of Falls Church, supra, precluded any claim that the ordinance violated

the Fourteenth Amendment's equal protection clause. Hogge v. Johnson, supra, 526 F.2d at 835. And in Colorado Springs Amusements, the Third Circuit, like the Fifth Circuit in Tomlinson, saw no room for argument that a Philadelphia ordinance prohibiting opposite-sex massages unconstitutionally discriminated on the basis of sex and unreasonably abridged the right to pursue a lawful occupation. Colorado Springs Amusements, Ltd. v. Rizzo, supra, 524 F.2d at 576.

The binding precedents established by the Supreme Court's summary actions upholding ordinances prohibiting opposite-sex massages require this Court to dismiss plaintiffs' claims that the New York City ordinance violates the due process clause by interfering with the right to work and discriminate on the basis of sex.[11] However, the Supreme Court has yet to be presented directly with a challenge to the

constitutionality of an ordinance such as this where, as here, the parties claim violations of rights of privacy and association. It could be argued that in upholding ordinances prohibiting opposite-sex massages in the face of broadside attacks on their constitutionality the Court necessarily decided such ordinances present no constitutional problems whatsoever. This Court, however, believes that to accept that argument would be to give far too expansive an effect to summary dispositions. Summary actions taken by the Supreme Court should be given the narrowest possible interpretation consistent with the Supreme Court's disposition of the case in the context of the issues raised on appeal.

C

Turning, then, to plaintiffs' privacy and association claims, the Court

notes first, without so deciding, that as owners and operators of establishments allegedly prohibited by the City ordinance plaintiffs may well have standing to assert that the ordinance violates privacy and associational rights of their customers and club members. Craig v. Boren, 429 U.S. 190, 194-97 (1976). Even assuming standing, however, plaintiffs' privacy and association arguments raise no claims upon which relief can be granted.

The Supreme Court has never recognized a right of privacy for activities such as those carried on in plaintiffs' leisure spas, swingers club and health clubs. In Paris Adult Theatre I v. Slaton, 413 U.S. 49, 65 (1973), the Court expressly refused to extend the privacy rights it had recognized in Griswold v. Connecticut, 381 U.S. 479 (1965) (martial procreation decisions), and Stanley v. Georgia, 394 U.S. 557 (1969) (possession

of allegedly obscene material in one's own home), to commercial enterprises. The Court's reasoning in Paris Adult Theatre I applies equally to Wigginess, Spartacus and Sigelow's leisure spas, to Lea's health club and to New Wave's swingers club. The services of each of these establishments are open by individual purchase or by membership to the general public.

It is also clear that freedom of association does not apply to the activities in question here. That constitutional guarantee has been judicially derived by implication from the express guarantees of the First Amendment and is therefore limited to activities involving speech, press, petition and assembly. See, e.g., Buckley v. Valeo, 424 U.S. 1, 15 (1976), NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460 (1958); and L. Tribe, American Constitutional Law

Section 12-23 (1978).

III

In contrast to the many ordinances prohibiting opposite-sex massages enacted elsewhere, the New York City ordinance uses zoning to prohibit the operation of establishments offering or equipped to offer opposite-sex massages rather than directly proscribing such massages. Although plaintiffs contend that this distinguishes the instant case, the Court finds this to be a distinction without a difference. Land-use regulation to protect the health, safety, morals or welare of a community is a constitutionally valid use of states police power. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). It makes no constitutionally significant difference that New York City has chosen to prohibit opposite-sex massages through land-use regulation instead

of some other regulatory means. The City's regulatory scheme need only bear some rational relation to the City's legitimate interest in regulating massage establishments.

Subject to the specified exceptions noted above, the zoning ordinance prohibits the operation of any establishment "equipped or arranged so as to provide as part of its services massages, body rubs, alcohol rubs, baths or other similar treatment by members of the opposite sex." The definition of APCE, plaintiffs argue, is so broad that it renders the ordinance unconstitutional. To illustrate their contention, plaintiffs maintain that the breadth of the APCE definition enables the City to block even the construction of residental apartments (as allegedly done in Primero's case) because apartments can conceivably house APCEs.[12] The Court recognizes that without a limiting con-

struction the ordinance could possibly be read to apply to establishments in which there would be none of the opposite-sex massaging the City seeks to prohibit. Arguably this would subject the ordinance to constitutional attack as irrational. But that situation is not before this Court. The Wigginess, Spartacus, Sigelow and Lea operations admit that they provide opposite-sex massages, and New Wave by design offers facilities for possible massaging by club members of the opposite sex. The ordinance can constitutionally regulate the activities of the plaintiffs in this case.[13] Plaintiffs here have no standing to claim the ordinance unconstitutionally governs the conduct of others.[14]

IV

Plaintiffs Wigginess, Spartacus, Lea and Sigelow claim the APCE zoning ordinance

will require them to discriminate in employment on the basis of sex. Because nearly all of their patrons are male, they argue, they will be forced to discharge female massagists and thereby subject themselves to liability under Title VII of the Civil Rights Act of 1964 ("the Act"), as amended, 42 U.S.C. Sections 2000a et. seq. This inconsistency between the local enactment and federal statutory law, these plaintiffs contend, requires the Court to declare the city ordinance invalid under the supremacy clause.[15] The Court cannot agree.

Section 703 (a) of the Act, 42 U.S.C. Sections 2000e-2(a), makes it unlawful for an employer

> (1) to fail or refuse to hire to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race,

color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Apparently it is plaintiffs' argument that the facially neutral city ordiance banning opposite-sex massages in fact conflicts with Section 703(a) because its effect will be to discriminate against female massagists.[16]

Plaintiffs argue that because their clientele is almost exclusively male the ordiance will force them to "refuse to hire [and] to discharge" female massagists, in violation of Section 703(a)(1). The ordinance, however, requires plaintiffs neither to discharge nor to refuse to hire anyone. It only makes it unlawful

to operate certain establishments. The result of plaintiffs' ceasing an unlawful operation may be to curtail employment opportunities for female massagists, but this surely does not preclude the City's exercising its police power to prohibit practices it finds harmful to the public's health, safety, welfare or morals. Aldred v. Duling, 538 F.2d 637, 638 (4th Cir. 1976) (per curiam).

Although Wigginess, Spartacus, Sigelow and Lea do not specifically contend that the City ordinance conflicts with the Section 703(a)(2) of the Act, any argument they might make under this Section would have to be similar to their contentions under Section 703(a)(1) and, in this Court's opinion, would warrant the same response. The Court in Stratton v. Drumm, supra, 445 F. Supp. at 1312, addressing an East Hartford, Connecticut, ordinance prohibiting opposite sex

massages, saw this differently. Operators of East Hartford massage establishments would have "to limit, segregate, or classify [their] employees or applicants for employment" to ensure no massagist treated someone of the opposite sex, the Stratton court reasoned, and as a result prevent male and female massagists from competing for the same work opportunities. The court in Stratton concluded that this would amount to a violation of Section 703(a)(2). Accord, Ciancolo v. Members of City Council of Knoxville, 376 F. Supp. 719, 722 (E.D. Tenn. 1974). This Court respectfully disagrees. Ordinances prohibiting opposite-sex massages make it unlawful to provide such treatment and thus eliminate altogether the employment opportunity of massaging persons of the opposite sex. Section 703(a)(2) "cannot be read to foreclose the enactment of ordinances which have the effect of making

unlawful conduct which may not have been unlawful when Title VII was enacted." Aldred v. Duling, supra, 538 F.2d at 638.

This is not a situation where employment standards such as height and weight requirements, though facially neutral, have the effect of bringing about a discriminatory pattern of hiring and firing because of physiological differences between men and women. Cf. Dothard v. Rawlinson, 433 U.S. 321, 329 (1977). Nor can plaintiffs argue, as they attempt to do, that female massagists are discriminated against because their male clientele prefers to receive treatment from women. Employers may not discriminate on the basis of their customers' preferences. Diaz v. Pan American World Airways, Inc., 442 F.2d 385, 389 (5th Cir.), cert. denied, 404 U.S. 950 (1971). See 29 C.F.R. Section 1604.2(a)(1)(iii)(1979).[17]

V

Plaintiffs have not demonstrated that preliminary injunctive relief is appropriate in this instance. Not having established that they will suffer irreparable injury from denial of provisional injunctive relief, plaintiffs cannot satisfy either the Second Circuit's two alternative tests.

> Preliminary injunctive relief in this Circuit calls for a showing of "(a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief."

Jack Kahn Music Co. v. Baldwin Piano & Organ Co., 604 F.2d 755, 758 (2d Cir. 1979).

It is asserted by plaintiffs that

their business will be closed by injunction proceedings instituted by defendants in the Courts of New York State unless defendants are enjoined from proceeding to enforce the APCE ordinance. If they are closed in this manner, plaintiffs claim, they will be driven into insolvency and their operations will be fatally and irreparably injured. Plaintiffs, however, have presented nothing to this Court to support these contentions. Unsubstantiated allegations of injury cannot provide the basis for establishing the irreparable harm required for an injunction to issue.

The Court, moreover, does not believe plaintiffs are likely to succeed on the merits of their one claim now remaining for trial. It is unlikely that, given the nature of APCE operations and the city's strong interest in regulating

these establishments, plaintiffs will be able to demonstrate that the one-year amortization period is unreasonable, especially since the prohibition of APCEs does not amount to a deprivation of all reasonable uses of plaintiffs' property.

VI

The Court has not considered plaintiffs' claims under the New York Human Rights Law, N.Y. Exec. L. Sections 290-301, and does not have before it any claims plaintiffs might make under the New York State Constitution. Having dismissed all but one of plaintiffs' federal claims, the Court, in exercising its discretion under United Mine Workers of America v. Gibbs, 383 U.S. 715, 726 (1966), believes it best to leave plaintiffs' state claim to the New York Court to adjudicate.

Accordingly, plaintiffs' application for a preliminary injunction is denied, and defendants' cross-motion to dismiss is granted with respect to all of plaintiffs' claims except those of Wigginess, Spartacus, Sigelow, Lea and New Wave alleging the one-year amortization period for APCEs is an unconstitutional taking of property with compensation. These five plaintiffs and the City defendants are to prepare to proceed to trial on this issue. All of Primero's claims are dismissed.

Settle order on notice.

DATED: New York, New York
December 28, 1979

ROBERT J. WARD
U.S.D.J.

FOOTNOTES

1 Plaintiffs also claim jurisdiction under the Declaratory Judgment Act, 28 U.S.C. Sections 2201-2202, and Section 701 of the Civil Rights Act, 42 U.S.C. Section 2000e. The Declaratory Judgment Act, however, does not confer subject matter jurisdiction on the District Courts but only provides a remedy where jurisdiction exists independently. Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671-672 (1950). Moreover, Civil Rights Act Section 701 has nothing to do with jursidiction; it merely defines terms for the purposes of title VII. Although Section 706 (f)(3) of the Act, 42 U.S.C. Section 2000e-5(f)(3), gives the district courts jurisdiction over actions brought under title VII by aggrieved persons alleging employment discrimination, it does not establish district court jurisdiction over suits such as this to declare state statutes invalid under title VII's preemption provision, Section 708, 42 U.S.C. Section 2000e-7.

Plaintiffs ask the Court to strike down a New York City ordinance, but they have not named the city as a defendant. In Ellentuck v. Klein, 570 F.2d 414, 428 (2nd Cir. 1978), the Court of Appeals found itself without subject matter jurisdiction to consider a

claim seeking to annul a city enactment because the City of New York was not named as a defendant. The Court recognizes, however, that Ellentuck was decided before the Supreme Court in Monell v. Department of Social Services of the City of N.Y., 436 U.S. 658 690-91 (1978), held that a local government can be sued directly under 42 U.S.C. Section 1983 for declaratory relief where action under a municipal ordinance is alleged to be unconstitutional. It would have done the Ellentuck plaintiffs no good to amend their complaint to name New York City as a defendant because under pre-Monell law a local government could not sued directly under Section 1983. However, because Monell authorizes Section 1983 actions against substate government entities for declaratory relief, plaintiffs need only amend their complaint and name the city as a defendant to cure this technical pleading deficiency. To enable plaintiffs to pursue their one constitutional claim that has withstood defendants' motion to dismiss, plaintiffs will be given leave to amend their complaint to add the city as a named defendant.

Pendent jurisdiction provides the basis for the Court's jurisdiction over plaintiffs' title VII and state-law claims. Regarding the availability in this case of federal-question jurisdiction under 28 U.S.C. Section 1331, see n.15 infra.

2 Affidavit of Edward Sommerfeld, p.2 (October 15, 1979).

3 See affidavits of John W. Russell, Paragraphs 42-44 (November 9, 1979), and Fred Fredericks (October 16, 1979). The city has not said whether it believes Xtazy to be an APCE.

4 For the reasons noted infra. Primero's claims are dismissed in their entirety.

5 The use of the police power to terminate nonconforming used has long been recognized as constitutionally permissible. Hadacheck v. Sebastian, 239 U.S. 395 (1915). "In ascertaining the reasonable period during which an owner of property must be allowed to continue a nonconforming use, a balance must be found between the social harm [of a continued use] and private injury." Harbison v. City of Buffalo, 4 N.Y. 2d 553, 562, 176 N.Y.S. 2d 598, 152 N.E. 2d 42 (1958). See also Modjeska Sign Studios, Inc. v. Berle, 43 N.Y. 2d 468, 479, 402 N.Y.S. 2d 359, 373 N.E. 2d 255 (1977), dismissed for want of substantial federal question, 439 U.S. 809 (1978). The Court is not unmind-

ful that the New York courts have on two occasions upheld the one-year amortization period for APCEs. Commissioner of Dep't of Buildings of City of N.Y. v. Bocchino, N.Y.L.J., June 29, 1977, at 12, col. 1 (Sup. Ct. N.Y. Co.), aff'd mem., 59 A.D. 2d 1069, 399 N.Y.S.2d 829 (1st Dept. 1977); Commissioner of Dep't of Buildings of City of N.Y. v. Carpenter, N.Y.L.J., June 30, 1977, at 12, col. 5 (Sup. Ct. N.Y. Co. 1977), aff'd mem., 61 A.D. 2d 598, 402 N.Y.S. 2d 701 (1st Dept. 1978). Both Bocchino and Carpenter, however, involved the issuance of preliminary injunctions, and none of the plaintiffs here was a party in those cases. Accordingly, the Court is not prepared at this stage to give any collateral estoppel effect to those decisions. However, defendants are free to plead the defense of collateral estoppel in their answer and pursuant to 28 U.S.C. Section 1738 to argue this defense in further proceedings.

6 Plaintiffs also satisfy the requirement that their interest lie "within the zone of interest to be... regulated by the statute...in question." Association of Data Processing Service Organizations, Inc. v. Camp, supra 397 U.S. at 153.

7 The Supreme Court was also presented by the appeal in Wright with the question whether an ordinance outlawing opposite-sex massages creates an unconstitutional irrebuttable presumption that such massages lead to illicit sexual relations. See Statement of Jurisdiction, summarized in 47 U.S.L.W. (BNA) 3157 (1978). By dismissing the appeal for want of a substantial federal question the Court ruled there was no such constitutional infirmity.

8 Statement of Jurisdiction, summarized in 42 U.S.L.W. (BNA) 3270 (1974).

9 Statement of Jurisdiction, summarized in 42 U.S.L.W. (BNA) 3637 (1974). The precedential effect of the Rubenstein dismissal on plaintiffs' federal statutory sex-discrimination claims is discussed at greater length below. See n.16 infra.

10 Statement of Jurisdiction, summarized in 41 U.S.L.W. (BNA) 3123 (1972).

11 Even in the absence of the precedents established by the Supreme Court's summary actions, this Court would find no reason to permit plaintiffs to pursue these constitutional claims on the merits. The New York ordin-

ance creates no invidiously discriminatory sex-based classification. Nor would the Court be prepared to recognize any constitutionally guaranteed fundamental right to work in the common occupations of the community. Any such fundamental right that may have been recognized earlier "was derived solely from substantive due process cases which have been either discredited or overruled." Pollard v. Cockrell, supra, 578 F.2d at 1012. State statutes regulating business activity need only be rationally related to a legitimate state objective. This ordinance creates no suspect classification and affects no fundamental right, and thus need not withstand strict scrutiny. Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 488 (1955). It would not have been irrational for the New York City Board of Estimate to conclude that opposite-sex massages lead to immoral conduct or that such massages themselves offend the public morality. This Court will not substitute its judgment for that of the city's legislative body.

12 As noted earlier, the Court has determined under the abstention doctrine not to consider Primero's claims.

13 It is of course possible that the City will not move against New Wave if in fact New Wave does not offer massages. The Court here merely has assumed arguendo that New Wave has standing to raise its constitutional claims and only decides that if New Wave's activities are of the nature described in the ordinance the ordinance can be constitutionally applied to New Wave's establishment.

14 Cf. Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973). The overbreadth doctrine applies only to the government's regulation of speech. Whatever else plaintiffs may claim this ordinance regulates, it surely has no effect on freedom of speech.

15 The Court questions whether subject matter jurisdiction under 28 U.S.C. Section 1331 is available for plaintiffs' preemption claim, even assuming Wigginess, Spartacus, Lea and Sigelow could remedy the complaint's current defect and each allege a sufficient amount in controversy. However, even though plaintiffs' claim for declaratory relief may not "arise under" the provisions of title VII for the purpose of Section 1331 jurisdiction, because 28 U.S.C. Section 1343(3) confers jurisdiction on the Court to consider plaintiffs'

constitutional claims, the Court can "hear as a matter of pendent jurisdiction the claim of conflict between federal and state [i.e., city] law." Hagans v. Lavine, 415 U.S. 528 536 (1974).

Wigginess, Spartacus and Sigelow have standing to assert their preemption claim. It would appear that Lea, however, does not, for if, as Lea alleges, it is a not-for-profit corporation, it would not be subject to the requirements of title VII. See Section 701(b), 42 U.S.C. Section 2000e(b). Wigginess, Spartacus and Sigelow, it should be noted, allege that they regularly employ in excess of fifteen employees.

16 In Rubenstein v. Township of Cherry Hill, supra, the Supreme Court was presented on appeal with the question whether an ordinance prohibiting opposite-sex massages was "repugnant to [the] 1964 Civil Rights Act and thus violative of [the] Supremacy Clause." Statement of Jurisdiction, summarized in 42 U.S.L.W. (BNA) 3637 (1974). The Court's dismissal for want of a substantial federal question -- to be given effect as a decision on the merits under Hicks v. Miranda, supra -- could be taken as dispositive of plaintiffs title VII claim here. In Rubenstein, however, the plaintiffs apparently were not "employers" as defined in Section 701(b) of

the Act, see Stratton v. Drumm, supra, 445 F. Supp at 1310, and thus the federal-state conflict in issue in Rubenstein could only have arisen out of Section 1104 of the Act, 42 U.S.C. Section 2000h-4. Section 1104 provides that no "provision of this Act shall be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof." The court's dismissal in Rubenstein could simply have been predicated on a finding that since the Rubenstein plaintiffs were not Section 701(b) employers the application of an opposite-sex massage ordinance to their activities did not conflict with any"purpose" of the Act in violation of Section 1104. See Stratton v. Drumm, supra.

For the purposes of this motion to dismiss the Court has assumed Wigginess, Spartacus, Sigelow and Lea are Section 701(b) employers. Consequently, their preemption claim is governed by Section 708, 42 U.S.C. Section 2000e-7, rather than by Section 1104. Section 708 provides:

> Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require

or permit the doing of any act which would be an unlawful employment practice under this subchapter.

17 Defendants argue that even if the ordinance violates Section 703(a) the requirement that massagists treat only persons of the same sex constitutes a bona fide occupational qualification ("BFOQ") under Section 703(e)(1), 42 U.S.C. Section 2000e-2(e)(1). Although it is recognized that "Section 703 (e) provides only the narrowest of exceptions of the general rule requiring equality of employment opportunities," Dothard v. Rawlinson, supra, 433 U.S. at 333, it is conceivable that the BFOQ defense would be available to Wigginess, Spartacus, Sigelow and Lea in an action under Section 703(a). New York State, for example, recognizes that sex may be a BFOQ under its statutory counterpart to title VII, N.Y. Exec. Law Sections 290-301, in instances "[w]here sex is a bona fide factor in terms of community standards of morality, e.g., a man to work as an attendant in a men's washroom; a woman to work as a fitter in a girdle and brassiere establishment." 3 Empl. Prac. Guide (CCH) Paragraph 26,052 (B) (2) (1977).

APPENDIX C

BOARD OF ESTIMATE
CITY OF NEW YORK

Cal. 145.

Resolved, By the Board of Estimate, pursuant to the provisions of Section 200 of the New York City Charter, that the resolution of the City Planning Commission adopted on November 8, 1978 (Cal. No. 16) reading as follows:

Resolved. By the City Planning Commission that the Zoning Resolution of the City of New York, effective as of December 15, 1961, and as subsequently amended, is further amended by changes relating to various Sections concerning the definition and prohibition of Adult Physical Culture Establishments and requiring the amortization of existing adult physical culture establishments, establishing a new Board of Standards and

Appeals special permit for all other physcial culture or health establishments and deleting the existing City-wide moratorium on all physical culture or health establishments, as follows:

Matter in Bold Type is new:

Matter in brackets [ ], is old, to be omitted:

Matter in italics is defined in Section 12-10.

11-50 SEPARABILITY

[(c) The provisions of amendment CP-23116 affecting Section 32-18, 83-03, 04-061, 94-062, 94-081, 99-031, 101-031, 12-10, 81-021 and 86-524 are an entirety: should any portion be found unenforceable or invalid for any reason then this entire amendment shall be null and void in its entirety. No court of competent jurisdiction nor any administrative body may apply any doctrine of separability or severability to save any portion of amend-

ment CP-23116 in the event any portion is found unenforceable or invalid.]

12-10 DEFINITIONS

Adult Physical Culture Establishments

An "adult physical culture establishment" is any establishment, club or business by whatever name designated which offers or advertises or is equipped or arranged so as to provide is part of if its services, massages, body rubs, alcohol rubs, baths or other similar treatment, by members of the opposite sex. The following uses shall not be included within the definition of an adult physical culture establishment:

(1) establishments which routinely provide services by a licensed physician, a licensed chiropractor, a licensed osteopath, a licensed practical nurse or a registered professional nurse;

(2) electrolysis treatment by a licensed operator of electrolysis equipment;

(3) continuing instruction in martial or performing arts or in organized athletic activities;

(4) hospitals, nursing homes, medical clinics or medical offices; and

(5) barbershops or beauty parlors which offer massage to the scalp, the face, the neck or shoulders only.

Chapter 2 Non-Conforming Uses

52-70 TERMINATION OF CERTAIN NON-CONFORMING USES AFTER AMORTIZATION

52-76

Adult physical culture establishments

In all districts any adult physical culture establishment, unless subject to an earlier termination requirement contained in this Resolution, shall terminate not later than one year after the effective date of this provision and thereafter the space formerly occupied by such use shall be used only for a conforming use.